SUPREME COURT, U. S.
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IN THE

Supreme Court of The United States

OCTOBER TERM, 1957

No. 88

EDGAR B. SIMS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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The petitioner, Edgar B. Sims, prays that a writ of certiorari do issue from the Supreme Court of the United States to review a decision and judgment of the United States Court of Appeals for the Fourth Circuit, made and entered in the above-entitled case on February 8, 1958, by which said United States Court of Appeals affirmed the judgment of the United States District Court for the Southern District of West Virginia, holding said Edgar B. Sims personally liable, purportedly under the provisions of Section 6332 of the Internal Revenue Code of 1954, for his refusal to withhold from the wages of certain state employees sums

of money for the payment of income tax on income earned by said employees in endeavors separate and apart from and entirely unrelated to their state employment. A petition for a rehearing was filed on March 7, 1958, which, by an order dated March 13, 1958, was denied.

OPINIONS BELOW

A judgment order, dated July 24, 1957, was entered against the defendant, Edgar B. Sims, by the Judge of the United States District Court for the Southern District of West Virginia. Said District Court rendered no formal opinion and no opinion is reported. However, the District Judge made a statement from the bench giving his reasons for holding the defendant personally liable, a copy of which is included in the Appendix hereto.

The opinion of the United States Court of Appeals for the Fourth Circuit, included in the Appendix hereto, is reported in 252 F. 2d 434.

JURISDICTION

The judgment of said Court of Appeals was entered on February 7, 1958 (Tr. 24). As heretofore stated, a petition for a rehearing was denied on March 13, 1958 (Tr. 30). There has been no extension of time within which to petition for certiorari nor has there been any stay requested or granted in the execution of the judgment. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the provisions of Sections 6331 and 6332 of the Internal Revenue Code of 1954 apply to states and state officers, and, in particular, to this petitioner, the Auditor of the State of West Virginia.

2. Whether a state auditor who declines to honor a levy served upon him in his official capacity, purportedly under the provisions of Sections 6331 and 6332 of the Internal Revenue Code of 1954 (26 U.S.C. 6331 and 6332), is individually and personally liable under the penal provisions set out in Section 6332(b) of said Code.

3. If, technically, Section 6332(b) applies to states and state officers, said section being penal in nature, should this petitioner be personally liable, in view of the fact that he acted on the advice of the state attorney general and pursuant to an honest interpretation of a statute not heretofore interpreted by this Court and not heretofore judicially settled?

STATUTES INVOLVED

The pertinent provisions of the Internal Revenue Code of 1954 are quoted as follows:

Section 6321 (26 U.S.C. 6321). Lien for taxes:

> "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in ad-

dition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

Section 6331 (26 U.S.C. 6331). Levy and distraint:

"(a) *Authority of Secretary or delegate.*—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401 (d)) of such officer, employee, or elected official. If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

"(b) *Seizure and sale of property.*—The term 'levy' as used in this title includes the power of distraint and seizure by any means. In any case in which the Secretary or his delegate may levy upon property or rights to property, he may seize and sell such property or

rights to property (whether real or personal, tangible or intangible).

"(c) *Successive seizures.*—Whenever any property or right to property upon which levy has been made by virtue of subsection (a) is not sufficient to satisfy the claim of the United States for which levy is made, the Secretary or his delegate may, thereafter, and as often as may be necessary, proceed to levy in like manner upon any other property liable to levy of the person against whom such claim exists, until the amount due from him, together with all expenses, is fully paid."

Section 6332 (26 U.S.C. 6332). Surrender of property subject to levy:

"(a) *Requirement.*—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

"(b) *Penalty for violation.*—Any person who fails or refuses to surrender as required by subsection (a) any property or rights to property, subject to levy, upon demand by the Secretary or his delegate, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes for the collection of which such levy has been made, together with costs and interest on such sum at the rate of 6 percent per annum from the date of such levy.

"(c) *Person defined.*—The term 'person,' as used in subsection (a), includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to surrender the property or rights to property, or to discharge the obligation."

Section 7403 (26 U.S.C. 7403). Action to enforce lien or to subject property to payment of tax:

"(a) *Filing.*—In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary or his delegate, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability.

"(b) *Parties.*—All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto.

"(c) *Adjudication and decree.*—The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property, by the proper officer of the court, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States.

"(d) *Receivership.*—In any such proceeding, at the instance of the United States, the court may appoint a receiver to enforce the lien, or, upon certification by the Secretary or his delegate during the pendency of such proceedings that it is in the public interest, may appoint a receiver with all the powers of a receiver in equity."

Internal Revenue Code—1939, Section 3678: Civil action to enforce lien on property:

"(a) *Filing.* In any case where there has been a refusal or neglect to pay any tax, and it has become necessary to seize and sell property and rights to property, whether real or personal, to satisfy the same, whether distraint proceedings have been commenced or not, the Attorney General at the request of the Commissioner may direct a civil action to be filed, in a district court of the United States, to enforce the lien of the United States for tax upon any property and rights to property, whether real or personal, or to subject any such property and rights to property owned by the delinquent, or in which he has any right, title, or interest, to the payment of such tax.

"(b) *Parties to proceedings.* All persons having liens upon or claiming any interest in the property or rights to property sought to be subjected as aforesaid shall be made parties to such proceedings and be brought into court.

"(c) *Adjudication and decree.* The said court shall, at the term next after the parties have been duly notified of the proceedings, unless otherwise ordered by the court, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and

liens upon the property and rights to property in question, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property and rights to property, by the proper officer of the court, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States.

"(d) *Receivership.* In any such proceeding, at the instance of the United States, the court may appoint a receiver to enforce the lien, or, upon certification by the Commissioner during the pendency of such proceedings that it is in the public interest, may appoint a receiver with all the powers of a receiver in equity."

Chapter 12, Article 3, Section 13a, West Virginia Code.

"*Deductions by State Auditor from Salaries of State Officials and Employees to Pay Taxes and Purchase United States Government Bonds.* —The auditor of the State of West Virginia is authorized to deduct and withhold sums from the salaries or other compensation of state officials and employees, to purchase United States government bonds and other United States government obligations, or to pay taxes as may be required by an act or acts of the congress of the United States of America.

"The auditor of the State of West Virginia shall, upon the written request or order of any state official or employee, deduct and withhold sums from the salaries or compensation of state officials and employees to make voluntary purchases of United States government bonds or other United States government obligations for such officials or employees.

"The auditor shall keep an account of the accumulated deductions of each state official and employee and shall issue receipts to state officials and employees for all sums deducted and withheld as herein provided. The sums, when deducted, shall be transferred by the auditor to a special fund in the state treasury, and, as soon as reasonably convenient, transmitted to the treasurer of the State of West Virginia, as an issuing agent of federal securities, or such other official or agent of the United States government designated by the secretary of the treasury of the United States of America, from time to time.

"Should any official or employee leave the employ of the State at a time when there is not sufficient accumulation of deductions from his salary or compensation to purchase a United States government bond then the auditor shall either purchase United States government savings stamps in the amount of the accumulation or refund to the official or employee the accumulation as an erroneous payment into the special fund herein created.

"The auditor shall be responsible for the delivery of United States government bonds or obligations purchased with the deductions from the salaries or compensation of state officials and employees only when the United States government bonds or obligations are presented to him by the official or agent of the United States government for delivery to the state officials or employees.

"To promote efficiency and economy in making such deductions as provided herein, the auditor is authorized to promulgate rules and regulations and to designate the time for the presentment of the pay roll requisitions for state

officials and employees and requisitions for other claims against the State: Provided, that all officials and employees shall be paid at least once every thirty-one days. All officials and employees of the State shall comply with the rules and regulations promulgated by the auditor under this section."

STATEMENT

The United States instituted a civil action against this petitioner, as Auditor of the State of West Virginia and as an individual, pursuant to the hereinafter-described factual situation. As stated in the complaint filed in the United States District Court for the Southern District of West Virginia (Tr. 1-A), certain employees of said state failed to pay taxes to the federal government on incomes earned by them in employment separate and apart from, and entirely unrelated to, their state employment. In relation to any moneys earned by them, as employees of the state, taxes thereon have been withheld by the state and have been remitted to the Director of Internal Revenue. No taxes are owed by such employees to the government for any wages earned pursuant to their state employment. This case arose only on account of the additional money earned by such employees in various endeavors entirely separate and apart from state employment.

The district director, after having made demands upon such taxpayers, and after having failed to receive payment, served, in each instance, a Notice of Levy on the State of West Virginia by serving a copy thereof on Edgar B. Sims, Auditor, State of West Virginia. Four of such notices were addressed to the State of West Virginia, as the name of the person

holding property, moneys, etc., belonging to the taxpayer. One was addressed to "Edgar B. Sims, State Auditor of the State of West Virginia." All of such notices were served on Edgar B. Sims, Auditor, State of West Virginia. The government claimed as authority for the service of such notices Sections 6331 and 6332 of the Internal Revenue Code of 1954.

On the advice of the office of the Attorney General of West Virginia, this petitioner, acting in his official capacity as auditor of said state, and exercising the discretion he believed required of him, refused to honor said Notices of Levy. The government subsequently instituted an action against this petitioner as auditor of the state and as an individual. As a result of his motion to dismiss (Tr. 13-A), the defendant, as auditor, was dismissed, but the suit was maintained against him in his individual capacity (Tr. 15-A). On May 23, 1957, this case was heard by the Judge of the District Court, on argument of counsel, whereupon the court rendered its decision in favor of the United States. The opinion of the court was stated orally at the conclusion of argument by counsel, there being no written opinion. Pursuant thereto, the court, on July 24, 1957, entered its order (Tr. 25-A).

An appeal was taken to this judgment (Tr. 10), and, after hearing the case on argument and briefs of counsel, the United States Court of Appeals for the Fourth Circuit, on February 7, 1958, affirmed the holding of the District Court (Tr. 24). A petition for a rehearing of the case was denied on March 13, 1958 (Tr. 30).

Basis of Federal Jurisdiction in Court of First Instance

The court of first instance in this case was the United States District Court for the Southern District of West Virginia. The complaint of the United States based the jurisdiction of such court on the provisions of Sections 7401, 6331 and 6332 of the Internal Revenue Code of 1954.

REASONS FOR GRANTING WRIT

The United States Court of Appeals for the Fourth Circuit, in the decision sought to be reviewed:

1. Has decided important questions of federal law which have not been, but should be, settled by this Court.

In support of its decision, holding Edgar B. Sims, Auditor of the State, personally liable, the Court of Appeals relies, in part, on certain cases wherein it was held that the United States could enforce its tax lien against moneys owed by the state to a delinquent taxpayer and that in so doing it can include the state in the suit as a party defendant. It cites *United States* v. *Newhard*, 128 F. Supp. 805 (1955), and *United States* v. *Graham*, 96 F. Supp. 318 (1951). That the *Newhard* case is not authority for holding a state officer personally liable is evidenced by the following language, contained in the opinion thereof:

> "The plaintiff expressly denies that it is attempting to secure a penalty judgment against the County Treasurer of the County pursuant to

§ 3710(b), 26 U.S.C.A., but asserts that it is trying to enforce its lien by civil action pursuant to § 3678, 26 U.S.C.A. * * *"

The action in that case was instituted under Section 3678 of the Internal Revenue Code of 1939 (now Section 7403 of the IRC, 1954), not under Section 3710, which is the same as the present Section 6332. No attempt therein was made to apply the latter statute, which is penal in nature. The same is true of the *Graham* case, *supra*.

The court below noted that as early as 1935 the government sought to levy upon the accrued salary of an employee of a county and cited *United States* v. *Brechtel*, 90 F. 2d 516 (1937), as an example thereof. Judgment was entered against the government. Regardless of the reason for such judgment, that case clearly did not resolve any of the questions presented for consideration in the instant case.

The foregoing emphasizes the uncertainty with which the decision below was reached and points up the necessity for an adjudication of these questions by this Court. An examination of the cases fails to reveal that this Court or any other federal court has actually considered or decided whether the provisions of said Sections 6331 and 6332 apply to states and state officers; or whether a state officer, under the circumstances described in this case, should be held personally liable under the penal provisions of Section 6332.

The Court of Appeals, in its efforts to answer the pertinent questions involved in this case, actually rendered its interpretation of Section 7403 of the Internal

Revenue Code of 1954 (action to enforce lien or to subject property to payment of tax), and cited cases instituted pursuant thereto. It reasoned that since said Section 7403 has been held to apply to states, Sections 6331 and 6332 would likewise apply. Although all of these sections deal with the collection of delinquent taxes, it is significant that the former provides for proceedings against property while the latter two are against persons and are penal in nature. An interpretation thereof based on comparison should not be allowed to stand as the law without consideration thereof by this Court.

To the best of our knowledge, based on a thorough examination of the authorities, this Court has never been called upon to interpret said Sections 6331 and 6332, in relation to their application to states and states officers, and, in particular, to the matter of personal liability of a state officer under the circumstances set out herein. This is believed to be an important federal question which should be settled by this Court.

It is important that this Court review the proceedings in the court below for the additional reason that the decision, as it now stands, can have a grave effect on the future actions of the great numbers of public officials throughout the United States. Heretofore, a public official, performing a discretionary duty within the scope of his authority, was granted immunity from personal liability, even though he had adopted a mistaken construction of an act of Congress or a state statute. 43 Am. Jur. 85, Public Officers, Section 273; 67 C.J.S. 417, Public Officers, Section 125; *Cooper* v. *O'Connor*, 99 F. 2d 135 (1938).

The Court of Appeals has now held that the above general and well-established rule of law has been changed by Congress and that a state officer may be held personally liable under the penal provisions of Section 6332 of the Internal Revenue Code of 1954. It is pertinent that the language of such section fails to include specifically public officers and that the decision of the court below was arrived at by an interpretation thereof. The possible effect of this decision on the future actions of public officers is ominous. Under circumstances where a public officer is under a duty to exercise discretion in disbursing public funds, it can readily be seen that he may now be reluctant to perform such duty. With the threat of personal liability existing where it did not heretofore exist, it is conceivable that he would refuse to exercise the required discretion, thereby, in some instances, depriving the public of the protection of law.

It is submitted that this important question has not been, but should be, considered and settled by this Court.

2. Has decided federal questions in a way in conflict with applicable decisions of this Court and with those of other courts of appeals.

The Court of Appeals has held that the term "person," as used in Section 6332, includes a state. It is believed that such view is contrary to the decision of this Court, as expressed in *United States* v. *Baltimore and Ohio Railroad Company*, 84 U.S. 322, 21 L.Ed. 597 (1873). Therein the Court held that the terms "person" and "corporation," as used in the Acts of Congress touching internal revenue do not include a state.

While the court below clearly admits that the definition of "person", in Section 6332 (c), does not specifically mention public officers, it, in effect, says that it would be absurd to exclude them from such definition. The Supreme Court of the United States, in forceful and cogent language, has held that great caution must be exercised in rejecting the literal meaning of a statute in favor of a construction in harmony with the *supposed* spirit and purpose thereof. In *Crooks* v. *Harrelson*, 282 U.S. 55, 75 L.Ed. 156 (1930), the court said:

> "Courts have sometimes exercised a high degree of ingenuity in the effort to find justification for wrenching from the words of a statute a meaning which literally they did not bear in order to escape consequences thought to be absurd or to entail great hardship. But an application of the principle so nearly approaches the boundary between the exercise of the judicial power and that of the legislative power as to call rather for great caution and circumspection in order to avoid usurpation of the latter. Monson v. Chester, 22 Pick. 385, 387. It is not enough merely that hard and objectionable or absurd consequences, which probably were not within the contemplation of the framers, are produced by an act of legislation. Laws enacted with good intention, when put to the test, frequently, and to the suprise of the law maker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts. * * *"

It is submitted that the opinion of the Court of Appeals is in conflict with the opinion in *Crooks* v. *Harrelson*, *supra*. In the instant case, the court below, on the basis of absurdity, has chosen to insert certain

words into a statute, thereby changing such statute to include what it believes Congress desired to include. This Court has said that this should not be done; that, if a law is objectionable, the remedy lies with the law making authority, and not with the courts. See also *Pennsylvania Railroad Co.* v. *Chesapeake and Ohio Railroad Co.*, 229 F. 2d 721 (1956) and *St. Louis Co.* v. *United States*, 237 F. 2d 151 at 158 (1956), both of which cite *Crooks* v. *Harrelson, supra*, for the above proposition of law. The above-quoted language of the *Crooks* case is set out in full in the opinion of *St. Louis* v. *United States, supra*..

This matter of interpretation becomes all the more important in view of the fact that the construction of a tax statute is involved. It is the generally accepted view that a tax measure should be strictly construed, and whatever doubts exist therein should be resolved against the government. *Shwab* v. *Doyle*, 258 U.S. 529, 66 L.Ed. 747 (1922); *Gould* v. *Gould*, 245 U.S. 151, 62 L.Ed. 211 (1917); *United States* v. *Merriam*, 263 U.S. 179, 68 L.Ed. 240 (1923). In the instant case, not only a tax measure, but one penal in nature, is involved. In construing such statute, the court below has expanded its meaning beyond the actual language contained therein. It is believed that this constitutes a conflict with the decisions of this Court and with those of other Courts of Appeals, which should be resolved by the review herein sought.

The case under consideration concerns the personal liability of Edgar B. Sims, Auditor of the State of West Virginia. In *Cooper* v. *O'Connor*, 99 F. 2d 135 (1938), Associate Justice Miller of the United States Court of

Appeals for the District of Columbia said, in relation to personal liability of public officials:

> "* * * if the act complained of was done within the scope of the officer's duties as defined by law, the policy of the law is that he shall not be subjected to the harassment of civil litigation or be liable for civil damages because of a mistake of fact occurring in the exercise of his judgment or discretion, or because of an erroneous construction and application of the law. * * *"

While the court below, in the instant case, appeared to agree with the proposition of law expressed therein, it did not follow such case in its decision. It makes no distinction between public officers and officers of a corportion or other private association. By reason thereof, it is believed that its decision is in direct conflict with that of the *Cooper* case. It is respectfully submitted that this conflict should be settled by this Court.

Further, in relation to this matter of construction of statutes by the courts, it is noteworthy to consider the comments of the Court of Appeals, in regard to *Smith* v. *Jackson*, 246 U.S. 388, 62 L. ed. 788 (1918). Therein the court pointed out that a federal disbursing officer has no right to set-off, against a federal employee's salary, for debts owing to the United States. The Court of Appeals, in the instant case, reasoned as follows: "Undoubtedly, Section 6331 was designed to alleviate this difficulty and to subject federal employees to the same collection procedures as are available against all other taxpayers, including employees of the state." Why could not the court have interpreted "any person" to include the federal government? It had no difficulty in doing so to include states. Why was the

statute (6331) amended to specifically include the federal government? It is respectfully urged that the same need exists to include specific words bringing states within the statute as existed in amending the statute to include the federal government. It is believed that this matter should be adjudicated by this Court.

The Court of Appeals held that Chapter 12, Article 3, Section 13a, of the West Virginia Code (Michie, 1031(1)) authorized the State Auditor to deduct and withhold sums from employees' wages as demanded in the levy. Said Section 13a is quoted herein under STATUTES INVOLVED. It was enacted in 1943, at a time when all means were directed to enhance our war efforts. One of its main purposes was to facilitate the purchase of government bonds. The other purpose was to permit deductions from wages for the payment of income taxes directly to the government. This is not to say, however, that our Legislature thereby intended to discard the sovereignty of the State and to make it a general agent for the collection of delinquent taxes, regardless of the source of income. It is earnestly urged that the purpose of said Section 13a was confined to the above two objectives and was not designed to authorize the Auditor to withhold sums pursuant to the instant levy.

CONCLUSION

For the reasons stated the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

1. OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 7525

EDGAR B. SIMS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Argued Nov. 21, 1957

Decided Feb. 7, 1958

Fred H. Caplan, Asst. Atty. Gen., of West Virginia (W. W. Barron, Atty. Gen., of West Virginia, on brief), for appellant.

Mildred L. Seidman, Atty., Dept. of Justice, Washington, D. C. (Charles K. Rice, Asst. Atty. Gen., Lee A. Jackson and Melva M. Graney, Attys., Dept. of Justice, Washington, D. C., Duncan W. Daugherty, U. S. Atty., Huntington, W. Va., and Percy H. Brown, Asst. U. S. Atty., Charleston, W. Va., on brief), for appellee.

Before SOPER, SOBELOFF, and HAYNSWORTH, Circuit Judges.

SOBELOFF, Circuit Judge.

The sole issue in this case is whether a state official who makes payment of accrued salaries to state employees in disregard of a notice of levy by the Commissioner of Internal Revenue for taxes due the United States by such employees may be held personally liable.

Edgar B. Sims, State Auditor of West Virginia, appeals from a judgment of $519.71 entered against him individually in favor of the United States for refusing to surrender the accrued wages of three employees of the state after the District Director of Internal Revenue had served notices of levy upon him.

The three employees owed federal taxes upon earnings in endeavors apart from their state employment. The Commissioner of Internal Revenue made an assessment of tax deficiencies as to each and forwarded the assessments to the Director of Internal Revenue at Parkersburg, West Virginia, for collection. The Director demanded payment from each of them, and, the deficiencies remaining unpaid for more than ten days, he served on the State Auditor notices of levy upon their accrued salaries pursuant to Section 6331 of the 1954 Internal Revenue Code (26 U.S.C.A.). When the levies were made, the three employees had accrued "take home pay" totalling $519.71.

On the advice of the office of the Attorney General of West Virginia, the appellant refused to honor the notices of levy, and issued to each of the employees a warrant for the payment of his salary.

Thereafter, the government brought this suit in the United States District Court for the Southern District of West Virginia against Sims pursuant to Section

6332 of the 1954 Internal Revenue Code (26 U.S.C.A.), to recover a sum equal to the value of the property not surrendered. As originally brought, the suit was against Sims individually and as Auditor of the State of West Virginia. The defendant filed a motion to dismiss the action, and the Court granted it insofar as it related to the defendant as Auditor of West Virginia, but overruled it as to Sims in his individual capacity. On the stipulated facts, the court entered judgment against Sims in the amount of $519.71 plus interest, and this appeal followed.

In unambiguous terms, Section 6331 authorizes the collection of delinquent taxes "by levy upon all property and rights to property" belonging to a delinquent taxpayer; and it is not disputed that, in general, accrued wages are properly subject to levy. 9 Mertens, Taxation (1943), Sec. 49.165; United States v. Long Island Drug Co., 2 Cir., 1940, 115 F.2d 983, 986. See: 26 C.F.R. Sec. 301.6331-1(a) (1); II-1 Cum. Bull., 172 (I.T.1557) (1923).

In spite of the Statute's broad language, the appellant contends that the accrued salaries of state employees must be treated differently. He relies heavily on the fact that in 1928 the Internal Revenue Service itself rules that salaries of certain municipal officers were not subject to distraint while in the hands of a city treasurer. VII-1 Cum.Bull., 72 (I.T.2405) (1928). Since this ruling was not expressly revoked until 1955 (1955-1 Cum.Bull., 551 Rev.Rule 55-227), Sims contends that "there appears to have been congressional acquiescence in the longstanding interpretation."

Administrative interpretations are not absolute rules of law which must necessarily be followed

in every instance, but are only helpful guides to aid courts in their task of statutory construction. The extent to which a court will place reliance upon an administrative interpretation depends on the circumstances, including the general purpose of the act, the authoritative source of the regulation or ruling, the clarity of the statutory language, the consistency of administrative policy, and whether administrative interpretation was brought to the attention of the legislators when they re-enacted, modified, or refused to change the statute. Cf., e. g., Helvering v. New York Trust Co., 1934, 292 U.S. 455, 54 S.Ct. 806, 78 L.Ed. 1361; United States v. Leslie Salt Co., 1955, 350 U.S. 383, 76 S.Ct. 416, 100 L.Ed. 441. See: Brown, "Regulations, Reenactment and the Revenue Acts," 54 Harv. L.Rev. 377 (1941).

Since departmental rulings not promulgated by the Secretary of the Treasury "do not commit the Department to any interpretation of the law which has not been formally approved and promulgated by the Secretary" (see the cautionary notice published as a preface to the Cumulative Bulletins), Mr. Justice (later Chief Justice) Stone referred to them as being "of little aid in interpreting a tax statute." Biddle v. Commissioner, 1938, 302 U.S. 573, 582, 58 S.Ct. 379, 383, 82 L.Ed. 431. The first authoritative declaration was not made until 1955, shortly after the enactment of the Internal Revenue Code of 1954 (but before the levy in this case), when a Treasury Regulation, 26 C.F.R. Sec. 301.6331-1(a) (4) (ii), expressly declared that Section 6331 permitted levy on accrued salaries of state and municipal employees. That the Treasury Department was not committed to the 1928 ruling

(I.T.2405) is borne out by the fact that there was no uniform adherence to its principle, but rather that it was repeatedly, if not consistently, ignored. It is noted that as early as 1935, the Government sought to levy upon the accrued salary of an employee of Woodbury County, Iowa. See: United States v. Brechtel, 8 Cir., 1937, 90 F.2d 516. There are numerous other instances of levies on state employees' salaries.

It does not appear that Congress was, at any time, cognizant of the 1928 ruling (I.T.2405), and, for this additional reason, it cannot be said that it received legislative ratification. "Whenever congressional awareness of the administrative interpretation does not appear and seems unlikely, the basis for the re-enactment rule vanishes." Davis, Administrative Law (1951), Ch. 5, Sec. 59, p. 208. Dean Griswold has said, "* * * the mere re-enactment of a statute following administrative construction should be given no weight whatever in determining the proper construction of the statute." Griswold, "A Summary of the Regulations Problem," 54 Harv.L. Rev. 398, 400 (1941). The evidence is to the contrary of the basic assumption of the re-enactment rule, for when the Chief of Staff of the Joint Committee on Internal Revenue Taxation inquired, in 1950, whether the statutes relating to levy were applicable to a state, the Acting Commissioner of Internal Revenue replied in a letter that "this office believes it has the authority to collect taxes from State employees and contractors who are delinquent as regards those taxes by service of notices of levy on State officials holding monies due to those delinquent taxpayers." Thus, if any Congressional ratification of administrative policy is to be

found, it would appear that Congress ratified the practice of which it was specifically made aware rather than the earlier ruling of which there is no evidence that it had any knowledge.

The appellant has suggested that the express provision in Section 6331 for levy upon the accrued salaries of employees of the federal government and the omission of reference to state employees indicate an intention on the part of the legislators to withhold authorization from the Commissioner of Internal Revenue with respect to the latter. The legislative history of Section 6331 does not reveal the existence of any such negative intention, however, and both the House and the Senate Committee Reports merely contain the statement that "The provisions as to levy on salaries of Government employees are the same as those applicable to any other delinquent taxpayer." H.Rep. No. 1337, 83rd Cong. 2nd Sess., S.Rep.No.1622, 83rd Cong. 2nd Sess., 1954 U.S.Code Cong. and Adm.News, pp. 4556, 5225.

Another and more likely explanation is at hand for the specific reference in Section 6331 to levy upon federal employees' salaries and the failure to mention state employees. It lies in a problem peculiar to the federal government. In Smith v. Jackson, 1918, 246 U.S. 388, 38 S.Ct. 353, 62 L.Ed. 788, it was held that a federal disbursing officer has no right to set-off against a federal employee's salary, for debts owing to the United States. Accordingly, the Comptroller General ruled that notices of levy are "attempts to set off the tax indebtedness due to the United States against moneys due from the United States to the debtor," and "the administrative official served with

such notice would be without authority to withhold any portion of the current salary of such employee in satisfaction of the notices of levy and distraint." 26 Comp. Gen. 907, 912 (1947). Undoubtedly, Section 6331 was designed to alleviate this difficulty and to subject federal employees to the same collection procedures as are available against all other taxpayers, including employees of the state.

It is noteworthy that a closely related collection remedy, the tax lien, has been held applicable to money in the hands of a state. Where the State of California owed rent to a delinquent taxpayer, it was held that the Government could establish a lien upon it, and that the state could properly be subjected to a suit to foreclose the lien. United States v. Graham, D.C.S.D.Cal.1951, 96 F.Supp. 318, affirmed sub. nom. State of California v. United States, 9 Cir., 1952, 195 F.2d 530, certiorari denied 344 U.S. 831, 73 S.Ct. 36, 97 L.Ed. 647. See also, United States v. Newhard, D.C.W.D.Pa. 1955, 128 F.Supp. 805, where the government successfully enforced a tax lien against the wages of a county employee. It would indeed be an incongruity for the lien and levy provisions to receive contrary interpretations, particularly as language of Section 6321, which provides for "a lien in favor of the United States upon all property and rights to property" of a delinquent taxpayer, is almost identical with the language of Section 6331. Neither logic nor the language of the statute demands such a result.

There is no Constitutional requirement that the salaries of state employees shall be treated differently from the salaries of others. Helvering v. Gerhardt, 1938, 304 U.S. 405, 58 S.Ct. 969, 82 L.Ed. 1427; Graves

v. People of State of New York ex rel. O'Keefe, 1939, 306 U.S. 466, 486, 59 S.Ct. 595, 83 L.Ed. 927. And the statute, Section 3401(C), 1954 I.R.C., (26 U.S.C.A.) which defines "employees," for withholding tax purposes, in terms includes state employees. More broadly considered, as Mertens said in commenting upon the 1928 ruling (I.T. 2405), "There seems to be no conceivable ground for this discrimination in favor of such employees." 9 Mertens, Taxation (1943), Sec. 49.165, P. 141, n. 41. "As we have frequently pointed out, statutes should be construed to avoid absurd consequences, as Congress must be presumed not to have intended what was absurd * * *." Jacobs v. Tawes, 4 Cir., 1957, 250 F.2d 611, 615.

Accordingly, we hold that Section 6331 authorized levy upon the accrued salary of a state employee.

Sims next contends that, even if the salaries of state employees may be levied upon, he is not subject to the suit for penalty because he is not a "person in possession of (or obligated with respect to)" the property upon which the levy was made. 26 U.S.C.A. § 6332. He argues that if he was in possession of the wages, he was in possession of them (or obligated with respect to them) in his capacity as State Auditor and that, "As an individual, the appellant had no more possession of or control over the wages of the taxpayers than any other individual private citizen of the state." Since the action against him as State Auditor has been dismissed, and he is now being sued only as an individual, Sims concludes that he cannot be liable.

However, by its very definition of the word "person," Section 6332 permits an action against an individual

"in his own person and estate" who has held property subject to levy in a purely representative capacity or whose obligation with respect to property arises solely from his employment. In terms, it includes a person who as "officer, employee, or member is under a duty to surrender the property or rights to property, or to discharge the obligation."

We hold that under the laws of West Virginia, the State Auditor is an officer obligated with respect to the salaries of state employees within the meaning of Section 6332. He issues the warrants directing the disbursement of wages, and employees entitled to payment for their services may enforce their rights by mandamus against him. State ex rel. Board of Governors of West Virginia University v. Sims, 1949, 133 W. Va. 239, 55 S.E.2d 505; State ex rel. Board of Governors of West Virginia University v. Sims, 1952, 136 W.Va. 789, 68 S.E.2d 489, 490; State ex rel. Board of Governors of West Virginia University v. Sims, 1954, 140 W.Va. 64, 82 S.E.2d 321, 328. In addition, the State Auditor is authorized to deduct and withhold sums from employees' wages "to pay taxes as may be required by an act or acts of the congress of the United States of America." 1 W.Va.Code (1955), Sec. 1031(1) [12-3-13a]. Therefore, Sims having been under a duty to surrender the property demanded of him, he is subject to the penalty which Section 6332 imposes upon any person who fails or refuses to honor the levy, namely, liability in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered.

Sims urges, however, that his refusal to honor the notices of levy was an act performed within the

scope of his official duty and that he should not be personally liable for the consequences. It is, of course, generally true that a public officer engaged in non-ministerial duties will not be civilly liable for an act performed within the scope of his authority, even if that act is based upon an erroneous construction of law. The rule is a reasonable one, designed to protect public officers from the harassment of private individuals allegedly injured by the official acts, and to insure effective administration of the law. 43 Am.Jur., "Public Officers," Secs. 274, 275, p. 87; Cooper v. O'Connor, 1938, 69 App.D.C. 100, 99 F.2d 135, 138, 118 A.L.R. 1440; Randall v. Brigham, 1868, 7 Wall. 523, 536, 19 L.Ed. 285; Papagianakis v. The Samos, 4 Cir., 1950, 186 F.2d 257, 260. But that is not to say that the Congress may not insure the effective administration of the federal tax laws and secure its rights in the collection of revenue by imposing a penalty upon those who refuse to honor government levies.

We do not overlook the fact that the definition of "person" in Section 6332 (c), in terms includes an officer or employee of a corporation who, as such officer or employee, is under a duty to surrender property or rights, but does not specifically mention public officers. It is not to be supposed, however, that Congress intended the definition to be restrictive and applicable only to corporate officers. In a legal context where, as we have seen, salaries due public employees are subject to the lien and levy procedures that apply to others, no reason appears for interpreting Subsection (c) of Section 6332 as narrowing the breadth of the other subsections which insure the effectiveness of levies made upon salaries of public employees.

We hold that Congress has imposed the liability of Section 6332 upon any person who refuses to surrender property subject to the provisions of Section 6331, including state officials.

The judgment must, therefore, be

Affirmed.

2. STATEMENT OF ORAL OPINION OF DISTRICT COURT

THE COURT: I wish that there were some precedent for a construction of these statutes as they apply to a situation such as is before me here. I am sure that any precedent would be helpful, and if we had some decision which was binding on this court I would, of course, follow that decision; but having no precedent at all, then it is the duty of the court as I see it to do the best it can to interpret the statutes and apply them to the facts of the case.

While I am somewhat disturbed by the provisions of Section 6332 (c) defining a person in that it does not mention officers or employees of a state, I think that there might be a valid argument that in not mentioning them they were intended to be excluded, but that would lead as I view it to a very illogical and unreasonable result.

As pointed out, while Section 6331 provides a method for levying on accrued salaries and wages of various federal employees and officials, there would be no way to collect any such levy if those departmental officials

of the federal government were not held to be included as persons, then there is no reason why a departmental official of a state government should not also be included as a person.

I think under the provisions of Section 6332 (a), particularly the parenthetical phrase, that the state auditor was obligated with respect to the moneys which are due to employees in view of the fact that if an employee's wages were withheld and he felt that he had the right to payment of wages, his remedy would be by a writ of mandamus against the auditor, which would certainly not operate on the auditor in his capacity as an arm of the State of West Virginia and would necessarily operate upon him in his personal and individual capacity, and he would be required individually to comply with any order of the court that was made.

Now, being obligated with respect to that debt of the state and being, as I believe, included in the definition of person, I think that the law is clear that demand having been made on him for the payment of the money, and he having refused to pay it and having paid it over instead to the employee, and further in view of the statute which does give him authority to deduct and withhold sums from the salaries of state employees to pay taxes as may be required by act of Congress, that plaintiff here has established its clear right to the relief for which it asks.

I shall not attempt to state the amount because that can be gathered from the stipulation of facts, but the United States will be given a judgment against the defendant Edgar B. Sims individually for the amount of taxes as ascertained by the stipulation.